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No. 79-6108

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

EMMA ARMOUR, et al., APPELLANTS

v.

JACK P. NIX, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Washington, D. C. 20530

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QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether this Court has jurisdiction of the appeal from the judgment entered by the three-judge court.

2. Whether the evidence establishes interdistrict violations with significant interdistrict effects.

INTEREST OF THE UNITED STATES

Because of its responsibility for federal litigation, the United States has a substantial interest in the efficient operation of the judicial system. That interest is implicated in the three-judge court issue presented in this case. Three-judge courts impose a heavy burden on limited judicial resources, not only at the district court level, but also in this Court, through the operation of the direct review provision (28 U.S.C. 1253). Moreover, as is true in many school desegregation cases, this case involves complex factual determinations concerning the intent of governmental officials and the effects of their actions over an extended period of time. Such cases are particularly illsuited for direct review by this Court. We are led to participate at this stage because, in our view, the appellants have not fully explored the jurisdictional problems presented by this case.

In addition, the United States has substantial enforcement responsibility with respect to school desegregation under Titles IV, VI and IX of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, 2000d and 2000h-2, and under the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701, et seq. The Court's resolution of the issues presented in this case would affect that enforcement responsibility. The United States has participated either as a party or as amicus curiae in most of the Court's school desegregation cases, including Brown v. Board of Education, 347 U.S. 483 (1954), 349 U.S. 294 (1955); Cooper v. Aaron, 358 U.S. 1 (1958); Green v. County School Board, 391 U.S. 430 (1968); Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Wright v. Council of City of Emporia, 407 U.S. 451 (1972); School Board of City of Richmond v. State Board of Education, 412 U.S. 92 (1973); Keyes v. School District No. 1, 413 U.S. 189 (1973); Milliken v. Bradley, 418 U.S. 717 (1974); Runyon v. McCrary, 427 U.S. 160 (1976); Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976); Milliken v. Bradley, 433 U.S. 267 (1977); Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977); Columbus Board of Education v. Penick, No. 78-610 (July 2, 1979); Dayton Board of Education v. Brinkman, No. 78-627 (July 2, 1979); and Estes v. Metropolitan Branches of Dallas NAACP, No. 78-253 (Jan. 21, 1980).

STATEMENT

This school desegregation suit involves the Atlanta metropolitan area. The suit was filed in 1972 as a class action by parents of black children attending public schools in the Atlanta metropolitan area (J.S. App. C 1). The defendants are the Atlanta Board of Education, the State Board of Education, and six county and three city boards of education in the metropolitan area (ibid.).

The amended and substituted complaint, filed in 1975, alleged that the Atlanta school system was 86% black, and that defendants and other state officials had committed interdistrict violations that substantially contributed to the high concentration of metropolitan area minority students in that system (J.S. App. K 15, 37). The complaint sought an interdistrict plan of desegregation, and requested the court to enjoin certain state statutes and constitutional provisions confining control of education to independent school districts to the extent that they might impede such a remedy (J.S. App. K 37-39).

On August 24, 1973, a three-judge court was convened. Because that court was uncertain whether the case required three judges, it directed the case to proceed simultaneously before a single judge and a three-judge panel (J.S. App. A 2).

Almost four years later, appellants moved to dissolve the three-judge court in light of intervening decisions of this Court. On September 30, 1977, the court denied the motion (J.S. App. B). The court pointed out that in the cases relied upon by appellants "no identifiable rule or regulation had been challenged on its face" (J.S. B 5). In contrast, the court stated, the appellants' "complaint in the instant case challenges the constitutionality of state statutes and constitutional provisions of the state of Georgia" (ibid.).

The case proceeded to trial on the issue of liability. At the close of appellants' evidence, several of the local school districts moved to dismiss the action against them. On March 2, 1978, the three-judge court granted their motions (J.S. App. C).

In March 1978, the remaining local school districts and the state board of education presented their evidence and in April 1978, appellants presented rebuttal. On September 24, 1979, the court issued an order finding that appellants had failed to prove the

liability of the remaining defendants and dismissing the case (J.S. App. D).[1] In this decision, the court made detailed findings of fact showing a history of widespread constitutional violations by governmental officials at all levels and a current condition of extreme disparity between the racial composition of schools in Atlanta and those in the suburbs.[2] Nevertheless, the court found no basis for an interdistrict remedy. The appellants filed notices of appeal from the district court's final judgment to both the Fifth Circuit and to this Court.[3]

DISCUSSION

1. This case raises important questions concerning the availability of interdistrict relief to remedy extreme disparities between the racial composition of schools in city school districts and those in the suburbs, when these disparities have been caused, at least in substantial part, by a history of unconstitutional state action. We agree with appellants, however, that this Court lacks jurisdiction of their appeal. This Court should accordingly dismiss the appeal, so that proceedings in the Fifth Circuit may resume as expeditiously as possible.

Appellants filed their protective notice of appeal under 28 U.S.C. 1253. This Court thus lacks jurisdiction unless this case was "required * * * to be heard" by a three-judge court and that court issued an order "denying * * * an * * * injunction."

1/ The decision was issued by the three-judge court and adopted by the single judge (J.S. App. D).

2/ These findings are summarized in the Jurisdictional Statement (pages 17-25). The findings amply support the court's conclusion that "historically * * * government officials at all levels contributed to the separation of the races in education" (J.S. App. D 2).

3/ The court of appeals has stayed all proceedings pending this Court's resolution of the jurisdictional issue.

Because this case was not required to be heard by a three-judge court and that court did not deny an injunction within the meaning of Section 1253, an appeal from the court's final judgment properly lies only in the court of appeals.

a. The three-judge court was convened pursuant to 28 U.S.C. (1964 ed.) 2281. Before its repeal, Section 2281 required the convening of a three-judge court whenever plaintiffs sought to enjoin the enforcement of a state statute on constitutional grounds. As the district court noted (J.S. B 3-4), the complaint in this action did seek to enjoin the enforcement of certain state statutes and constitutional provisions delegating control over education to local school districts to the extent that they might interfere with a remedy for proven interdistrict violations. [4/] But we agree with appellants that this request did not require the convening of a three-judge court.

Appellants have never challenged the state's policy of delegating control over education to independent school districts. [5/] Instead, appellants contend simply that state officials have engaged in unconstitutional practices that have resulted in a high degree of disparity between the racial composition of schools in the Atlanta

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4/ The constitutional and statutory provisions involved are Georgia Constitution, Article VIII, Section V, Chapter 2-6801; Georgia Code § 32-901 (1976); and Georgia Constitution, Article VIII, Section VII, Chapter 2-7001 (1945). The effect of these provisions is to confine control and management of public schools to county boards of education and municipal corporations. It is unclear whether these provisions would have to be enjoined to effectuate interdistrict relief.

5/ Appellants did challenge the constitutionality of the state constitutional provision providing for racially separate schools (Ga. Const. Art VIII Section I (1945)) and of the state statutory provisions prohibiting requiring students to attend, or teachers to teach at, certain schools on account of race (Ga. Code §§ 32-847 and 32-848 (1976)). In light of Brown v. Board of Education, 347 U.S. 483 (1954) and North Carolina Board of Education v. Swann, 402 U.S. 43 (1971), these constitutional and statutory provisions are so patently unconstitutional that a single, rather than a three-judge, court may invalidate them. Goosby v. Osser, 409 U.S. 512, 518 (1972); Bailey v. Patterson, 369 U.S. 31 (1962).

School District and those in the outlying suburban districts. The appellants sought to enjoin enforcement of the concededly constitutional legislative scheme establishing local control over education only to the limited extent that it might stand in the way of an effective remedy for this unconstitutional administrative behavior. This sort of incidental effect on a state's legislative policy does not trigger the need for a three-judge court. Costello v. Wainwright, 430 U.S. 325, 326 (1977).

In Costello, the lower court found unconstitutional overcrowding of prison inmates and ordered state officials to reduce the overcrowding. Id. at 325. The court of appeals held that only a three-judge court could issue such relief, because the court's order might require state officials to violate their statutory duty to accept custody of all prisoners. Id. at 326. This Court disagreed, holding that the "suspension of an otherwise valid state statute to effectuate federally mandated relief" does not require a three-judge order. Ibid.

The district court thought Costello distinguishable because there no challenge to any statute appeared on the face of the complaint. Although this Court noted in Costello that the complaint did not challenge any state statute, the decisive factor was the incidental nature of the effect on the state statute. The Court specifically explained that "[t]he applicability of § 2281 as written turns on whether a state statute is alleged to be unconstitutional, not on whether an equitable remedy for unconstitutional state administrative behavior ultimately impinges on duties imposed under concededly constitutional state statutes." 430 U.S. at 326.

This Court's distinction between a challenge to a statute only insofar as it may be an impediment to relief and a challenge

to a statute as a source of the evil is grounded on practical considerations. A three-judge court should be convened only if it is clear at the outset that the court will have to pass on the constitutionality of a state statute. When a statute is not challenged as the source of the evil, but only as a possible impediment to relief, this threshold determination cannot be made. The approach followed by the district court, which looks only to the face of the complaint and draws no distinction between substantive and remedial challenges, would require a three-judge court to be convened and to receive all the evidence even if it should ultimately be determined that there is no need to rule on the constitutionality of the state statute. "Section 2281 embodies no such wasteful and uncertain mandate." Costello, supra, 430 U.S. at 326.

This case is a cogent example of that wastefulness. Because the district court ultimately concluded that appellants had not established their claim of unlawful interdistrict segregation, it never reached the question whether the state statutory scheme could constitutionally stand in the way of the grant of appropriate relief.

b. There is another reason this Court lacks jurisdiction of the appeal. The three-judge court did not issue an order "denying * * * an * * * injunction" within the meaning of Section 1253.

Not every order of a properly convened three-judge court denying relief is directly appealable, even if it denies an injunction in the literal sense. Guided by the need to avoid a construction of Section 1253 that would frustrate the historic congressional policy of minimizing this Court's mandatory docket, this Court has held that a direct appeal lies from an order of a three-judge court denying an injunction only where the order "rests upon resolution of the merits of the constitutional claim presented below." MTM, Inc. v. Baxley, 420 U.S. 799, 804 (1975).

In Baxley, plaintiffs sought to enjoin a state's nuisance law on constitutional grounds. A three-judge court denied relief because it thought that the pendency of a state proceeding precluded federal intervention under the principles of Younger v. Harris, 401 U.S. 37 (1971). Because the three-judge court never reached the merits of plaintiffs' constitutional attack on the state statute, this Court held that it was without jurisdiction to consider plaintiffs' appeal. 420 U.S. at 804. The situation is the same here. The lower court denied relief, not because it found that the state's legislative preference for local control over education constitutionally prohibited a remedy for unlawful interdistrict segregation, but because it found that appellants had not established a current condition of unlawful racial separation. As in Baxley, the three-judge court never reached the merits of the constitutional challenge to the state statutes. This case is therefore controlled by Baxley; this Court should dismiss the appeal on that ground as well.

2. If the Court disagrees with our assessment of the three-judge court question, it should note probable jurisdiction. The issues raised by appellants are substantial ones and deserve the Court's full consideration.

We agree with appellants that the findings made by the district court establish that at least through the mid-1960s, governmental officials at all levels committed constitutional violations with significant interdistrict effects, and that evidence of this sort may furnish a predicate for interdistrict relief. Milliken v. Bradley, 418 U.S. 717, 744-745 (1974); id. at 755 (Stewart, J., concurring).

The basis for the district court's refusal to order relief is not entirely clear. Appellants read the district court as having attached critical importance to the fact that the individual local school districts were operating unitary, or near-unitary, school systems (J.S. 34-35). Much in the court's opinion supports appellants' interpretation of it (App. D, pages 26-27, 32-33). If the court's decision rests on this ground, it is in error: the operation of schools in a manner that reduces the amount of racial separation within each district does nothing to alter the disparity in the racial composition of schools between districts. Assuming arguendo that the court had another basis for its denial of relief, nothing in the court's opinion satisfactorily explains the divergence between the court's findings of constitutional violations and its denial of relief.

CONCLUSION

The appeal should be dismissed for want of jurisdiction. If the Court does not dismiss for lack of jurisdiction, it should note probable jurisdiction.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

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